

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

TERESA CHEN,

Plaintiff,

v.

GRANT COUNTY, D. ANGUS LEE, and
TAMMIE L. HECHLER,

Defendants.

NO. CV-09-0329-EFS

**ORDER GRANTING AND DENYING IN
PART DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT AND DENYING
DEFENDANTS' MOTION TO CONTINUE
TRIAL.**

A hearing occurred in the above-captioned matter on February 23, 2011, in Richland, Washington. Steven C. Lacy appeared on behalf of Plaintiff Teresa Chen; Defendants Grant County, D. Angus Lee, and Tammie L. Hechler were represented by Michael McFarland. Before the Court were Defendants' Motion for Summary Judgment (ECF No. [26](#)) and Motion to Continue Trial (ECF No. [64](#)). After reviewing the submitted materials and relevant authority and hearing from counsel, the Court is fully informed and grants and denies as moot in part Defendants' motion for summary judgment and denies its motion to continue. This Order memorializes and supplements the Court's oral rulings.

BACKGROUND¹

¹ When considering this motion and creating this factual section, the Court did not weigh the evidence or assess credibility; instead, the

1 A. Personnel

2 On October 2, 2002, the Grant County Prosecuting Attorney's Office
3 ("Grant County") hired Plaintiff Teresa Chen as Deputy Prosecutor VI.
4 Defendant Angus Lee was appointed as Prosecuting Attorney on January 9,
5 2009, to fill the vacancy created by former Prosecuting Attorney John
6 Knodell's election to Superior Court Judge. While campaigning for the
7 position, Mr. Lee publically stated that he intended to implement a
8 "vertical prosecution" system, under which deputies would handle their
9 assigned cases from charging through final resolution. Mr. Lee believed
10 this system to be more efficient and reliable; however, he made a
11 conscious decision to further evaluate the office before instituting any
12 major changes.

13 Under Mr. Knodell's administration, Ms. Chen handled the County's
14 appeals and was known as the "appellate deputy"; she was assigned few,
15 if any, files to handle from charging through final resolution. In
16 addition to her appellate work, Ms. Chen was a "back up" attorney in

17
18 Court believed the undisputed facts and the opposing party's evidence and
19 drew all justifiable inferences therefrom in her favor. See *Anderson v.*
20 *Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). However, the Court did
21 not accept as true assertions made by the opposing party if they were
22 flatly contradicted by the record. See *Scott v. Harris*, 550 U.S. 372,
23 380 (2007). Disputed facts are supported by a citation to the record,
24 while undisputed facts are drawn from the parties' Joint Statement of
25 Uncontroverted Facts Regarding Defendant's Motion for Summary Judgment
26 (ECF No. [63](#)), and are not supported by a citation.

1 Juvenile Court, handled a "rare trial" in Superior Court, consulted on
2 various issues, made charging decisions, and prepared adult felony cases
3 for trial.

4 Before Mr. Lee was appointed, Ms. Chen signed two letters opposing
5 his appointment: a letter in support of his opponent, Steve Hallstrom,
6 and a letter indicating her lack of confidence in Mr. Lee. On the day
7 he was appointed, Ms. Chen approached Mr. Lee regarding the future of her
8 position. Mr. Lee assured Ms. Chen that he wanted her to remain an
9 employee and that he would be making no immediate, significant changes
10 without "full consultation."

11 In January 2009, Mr. Lee consulted with Human Resources ("HR")
12 Director Defendant Tammie Hechler about personnel and budget issues. Mr.
13 Lee explained that once the vertical-prosecution system was implemented,
14 the appellate deputy position would be absorbed, creating a new all-
15 purpose deputy prosecuting attorney position. Mr. Lee's conversations
16 with Ms. Hechler did not focus on Ms. Chen's duties going forward. Ms.
17 Hechler was unaware of what Mr. Lee was doing with deputies "on the
18 ground, so to speak."

19 B. Ms. Chen's Leave

20 During this time, Ms. Chen became concerned about her health. At
21 a February 9, 2009 meeting with deputy prosecutors, Mr. Lee stated that
22 he expected deputy prosecutors to work from 8:00 a.m. to 5:00 p.m. After
23 the meeting, Ms. Chen expressed concern about this change and requested
24 an exception to these modified hours. Responding to Ms. Chen's request
25 and concerns, Mr. Lee wrote:

26 Also, you mentioned to me in person and also in the attached
email that you are concerned about your health. I am required

1 to inquire if you are requesting an accommodation for a
2 disability or medical issue. If you are, please let me know
and we will look into the issue for you.

3 Ms. Chen indicated in a return email that she was not requesting an
4 accommodation.

5 Aware that Mr. Lee had recently fired two other employees while they
6 were on sick leave, Ms. Chen sought advice from Ms. Hechler in the second
7 week of February 2009 as to what she could do "to take care of [her]
8 health and still preserve [her] job." Ms. Hechler advised Ms. Chen that
9 she "could seek leave under the [Family and Medical Leave Act (FMLA)]"
10 and that her "job would be more protected." Ms. Hechler made it clear
11 that, as a long-time employee, Ms. Chen was eligible for FMLA. Ms.
12 Hechler gave Ms. Chen a packet containing Grant County's FMLA policy, and
13 told her to read it over and to contact her if she had any
14 questions. Ms. Chen decided to take a few days of sick leave.

15 In March 2009, Ms. Chen told Mr. Lee that the burdens and stress in
16 the Prosecutor's Office were taking a toll on her health. Also during
17 this time, Carolyn Fair and Steve Scott, two of the six prosecutors
18 experienced in handling felony cases in Superior Court, resigned;
19 replacements were needed as soon as possible. (ECF No. 36, ¶ 1.)

20 On April 2, 2009, Ms. Chen presented Ms. Hechler a non-FMLA Medical
21 Release from Work or School, releasing Ms. Chen from work between April
22 2, 2009, and May 1, 2009. Ms. Hechler provided Ms. Chen with a Request
23 for Family Medical Leave form, which Ms. Chen signed. In an April 2,
24 2009 email, Ms. Hechler advised Mr. Lee that Ms. Chen had been released
25 from work between April 2, 2009, and May 1, 2009.

1 On April 8, 2009, Ms. Hechler sent Ms. Chen a Notice of Eligibility
2 and Rights & Responsibilities under the FMLA. In the Notice, Ms. Hechler
3 again notified Ms. Chen that she was eligible for FMLA leave, but that
4 Ms. Chen was required to provide a doctor certification before Grant
5 County could determine whether she was qualified for FMLA leave. Ms.
6 Hechler did not consult Mr. Lee before sending the notice to Ms. Chen.
7 Ms. Chen claims she relied on Ms. Hechler's February and March 2009
8 representations that she was eligible for FMLA leave in deciding to seek
9 FMLA leave on April 2, 2009.

10 C. Ms. Chen's Termination

11 Mr. Lee called Ms. Chen on April 6, 2009; the substance of this
12 telephone conversation is largely disputed. The parties agree that Mr.
13 Lee advised Ms. Chen that she was being assigned work in Moses Lake
14 District Court. Mr. Lee claims he advised Ms. Chen that, as part of his
15 transition to the vertical prosecution system, he was eliminating the
16 appellate deputy position and transferring her to the district court
17 deputy position. Ms. Chen recalls instead that Mr. Lee challenged her
18 on the issue of whether she was truly sick, demanded her resignation, and
19 threatened her with demotion to the district court position if she did
20 not resign. (ECF No. 37, Ex. 29; Ex. A, at 138-143.)

21 Ms. Chen advised Mr. Lee that she believed the assignment was
22 "punitive" and that district court was "below [her] abilities and
23 experiences." Yet, Ms. Chen claims she did not reject the offer
24 outright. (ECF No. 37, Ex. A, Ex. 29.) Mr. Lee decided to terminate
25 her.

On April 15, 2009, Mr. Lee advised Ms. Hechler of his decision to terminate Ms. Chen because her position had been eliminated and she was unwilling to accept the district court assignment. Before this date, Ms. Hechler knew some restructuring would take place, but did not know it pertained to Ms. Chen. Ms. Hechler sent a letter to Ms. Chen, which memorialized Mr. Lee's decision to terminate her and notified her that Grant County was accepting applications for a district court deputy prosecutor. Ms. Chen did not apply for the position.² The Grant County Prosecuting Attorney's office continues to use vertical prosecution; no "appellate deputy" position exists. On April 20, 2009, Ms. Chen faxed Ms. Hechler a copy of the Certification of Health Care Provider, completed by Mr. Ben Murrell, PA-C. Grant County never designated her leave as FMLA.

14 As HR Director, Ms. Hechler lacks authority to 1) hire and fire
15 deputy prosecutors, 2) supervise and control deputy prosecutors'
16 employment conditions, 3) determine deputy prosecutors' rate and method
17 of pay, and 4) exercise economic and operational control over deputy
18 prosecutors' employment relationships. Ms. Hechler must "make sure the
19 employment laws are being followed, the rights of employees aren't being
20 infringed upon, and the employee isn't doing anything against employer
21 policy." When Ms. Chen requested leave, Ms. Hechler understood that,
22 pursuant to Grant County's FMLA policy, Ms. Chen was eligible for FMLA
23 leave.³ Ms. Hechler was unaware that deputy prosecutors were in fact

³ To Ms. Hechler's knowledge, FMLA leave has been granted to three
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1 ineligible for FMLA benefits under the FMLA's "personal staff" exemption
2 until sometime after November 1, 2010: after this lawsuit's filing. Upon
3 learning of the personal staff exemption, Ms. Hechler brought the issue
4 before the Grant County Commissioners but is unsure whether that issue
5 was forwarded to Grant County's legal department. As of January 5, 2011,
6 FMLA policies at Grant County remain unchanged.

7 Ms. Chen filed this action on October 23, 2009, alleging claims for
8 1) violation of the Family Medical Leave Act, 29 U.S.C. § 2611 et seq.;
9 2) violation of Civil Rights, 42 U.S.C. § 1983; 3) discharge in violation
10 of Washington public policy; and 4) disability discrimination in
11 violation of RCW 49.60. Defendants moved for summary judgment on
12 November 11, 2010.

DISCUSSION

I. Defendant's Motion for Summary Judgment (ECF No. 26)

A. Summary Judgment Standard

16 Summary judgment is appropriate if the record shows "that there is
17 no genuine issue as to any material fact and that the moving party is
18 entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The
19 party opposing summary judgment must point to specific facts establishing
20

21 Prosecutor's Office employees during her tenure as HR Director: Teresa
22 Chen, D. Angus Lee, and Jessica Cafferty. Ms. Cafferty's leave began in
23 November 2010; she was not notified until January 3, 2011, that she was
24 actually exempt from coverage under the FMLA. Ms. Hechler was unaware
25 of the personal staff exemption until after Ms. Cafferty returned from
26 FMLA leave.

1 a genuine issue of material fact for trial. *Celotex Corp. v. Catrett*,
 2 477 U.S. 317, 324 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio*
 3 *Corp.*, 475 U.S. 574, 586-87 (1986). If the nonmoving party fails to make
 4 such a showing for any of the elements essential to its case for which
 5 it bears the burden of proof, the trial court should grant the summary
 6 judgment motion. *Celotex Corp.*, 477 U.S. at 322.

7 B. § 1983 First Amendment Retaliation Claim

8 Defendants seek dismissal of Ms. Chen's 42 U.S.C. § 1983 First
 9 Amendment retaliation claim because she was a "confidential" employee who
 10 could be discharged based on her political patronage. Ms. Chen concedes
 11 that Defendants are entitled to summary judgment on this claim. Indeed,
 12 Ms. Chen, as a deputy prosecutor, was a confidential or policymaking
 13 employee and could be terminated because she opposed Mr. Lee's
 14 appointment. See *Fazio v. City and Cnty. of San Francisco*, 125 F.3d 1328
 15 (9th Cir. 1997) (holding that a district attorney could fire an assistant
 16 district attorney for running against him in the election). Accordingly,
 17 the Court accepts Ms. Chen's concession that her § 1983 claim for
 18 violation of her First Amendment right to political speech should be
 19 dismissed.⁴

20

21 ⁴ In addition, Mr. Lee and Ms. Hechler are entitled to qualified
 22 immunity. There is no evidence that Mr. Lee and Ms. Hechler violated Ms.
 23 Chen's First Amendment rights by terminating her because she was a
 24 confidential or policymaking employee. Nor is there any case law clearly
 25 establishing that deputy prosecutors cannot be discharged for political
 26 patronage reasons. *Saucier v. Katz*, 533 U.S. 194, 201 (2001); Pearson
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1 C. Family and Medical Leave Act

2 Defendants concede there are triable issues of fact as to whether
 3 they retaliated against Ms. Chen and/or interfered with her FMLA rights.
 4 But Defendants argue that summary dismissal is still proper because Ms.
 5 Chen was not an "employee" entitled to FMLA protection in the first
 6 place. Ms. Chen does not dispute that she was not entitled to FMLA
 7 protection, but opposes the motion because Defendants are equitably
 8 estopped from asserting it.⁵

9
 10 v. Callahan, 555 U.S. 223 (holding the sequence set forth in Saucier is
 11 often appropriate, but not mandatory).

12 ⁵ Ms. Chen also argues that the defense that she is ineligible for
 13 FMLA benefits was not properly pled because Defendants failed to raise
 14 the issue in their Answer. To support this assertion, Ms. Chen relies
 15 on Federal Rule of Civil Procedure 9(a)(2), under which a defendant must
 16 specifically deny the plaintiff's capacity to sue and to state any
 17 supporting facts that are peculiarly within a defendant's knowledge in
 18 their answer. However, the Court finds that Rule 9(a)(2) does not apply
 19 because this is not a "capacity" issue. See *Moore v. Matthew's Book*, 597
 20 F.2d 645, 647 (8th Cir. 1979) ("The question of capacity to sue is
 21 whether the person bringing the suit has authority to use the courts of
 22 that jurisdiction."); see also *De Franco v. United States*, 18 F.R.D. 156
 23 (S.D. Cal. 1955) (recognizing that "capacity" means whether the plaintiff
 24 is free from infancy, insanity, or incompetency, which is different from
 25 "capacity to sue," or a right to relief under the facts). Yet,
 26 recognizing that Ms. Chen was prejudiced by Defendants' failure to

1 The FMLA's purpose is to balance the workplace demands with the
2 needs of families and entitles employees to take reasonable leave for
3 medical-related reasons while doing so "in a manner that accommodates the
4 legitimate interests of employers." 29 U.S.C. § 2601(b)(3). To achieve
5 this goal, the FMLA entitles eligible employees up to twelve (12) weeks
6 of leave each year for their own serious illness or to care for family
7 members and guarantees reinstatement after taking this leave. *Id.* §§
8 2612(a)(1), 2614(a)(1). To establish a prima facie case of retaliation,
9 a plaintiff must show: "(1) he availed himself of a protected right; (2)
10 he was adversely affected by an employment decision; and (3) there is a
11 causal connection between the two actions." *Price v. Multnomah Cnty.*,
12 132 F. Supp. 2d 1290, 1296 (D. Or. 2001).

13 Further, employers are precluded from "interfer[ing] with,
14 restrain[ing], or deny[ing] the exercise of or the attempt to exercise,
15 any right provided" by the FMLA, by either refusing or discouraging the
16 taking of FMLA leave. *Id.* § 2615(a)(1); see also *Liu v. Amway Corp.*, 347
17 F.3d 1125, 1133 (9th Cir. 2003). To prevail on a FMLA interference
18 theory, the employee must establish:

19 (1) he is an "[e]ligible employee," 29 U.S.C. § 2611(2); (2)
20 the defendant is an "[e]mployer," 29 U.S.C. § 2611(4); (3) the

21 articulate this argument before summary judgment, on December 20, 2010,
22 the Court continued the hearing and allowed the parties to submit
23 additional briefing on the equitable estoppel issue. (ECF No. 55.) The
24 Court relies on that additional briefing herein.
25
26

1 employee was entitled to leave under the FMLA, 29 U.S.C. §
 2 2612(a)(1); (4) the employee gave the employer notice of his
 3 intention to take leave, 29 U.S.C. § 2612(e)(1); and (5) the
 employer denied the employee FMLA benefits to which he was
 entitled.

4 *Wysong v. Dow Chem. Co.*, 503 F.3d 441, 447 (6th Cir. 2007) (quoting *Cavin*
 5 *v. Honda of Am. Mfg., Inc.*, 346 F.3d 713, 719 (6th Cir. 2003)); *Davis v.*
 6 *Mich. Bell Tel. Co.*, 543 F.3d 345, 350 (6th Cir. 2008).

7 1. FMLA Eligibility

8 To be entitled to FMLA protection, a person must meet the definition
 9 of "eligible employee":

10 The term "eligible employee" means an employee who has been
 11 employed--

12 (i) for at least 12 months by the employer with respect to whom
 leave is requested under section 2612 of this title; and

13 (ii) for at least 1,250 hours of service with such employer
 during the previous 12-month period.

14 29 U.S.C. § 2611(2)(A). The parties agree that Ms. Chen fulfills these
 15 preliminary requirements.

16 Yet, Ms. Chen was not eligible for FMLA protection because she falls
 17 within the FMLA's "personal staff exemption," which excludes individuals
 18 "selected by the holder of a public office of a political subdivision to
 19 be a member of his or her personal staff." 29 U.S.C. § 203(e)(2)(c); see
 20 *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 739 (2003) ("Employees
 21 in high-ranking or sensitive positions are simply ineligible for FMLA
 22 leave; of particular importance to the States, the FMLA expressly
 23 excludes from coverage state elected officials, their staffs, and
 24 appointed policymakers."); *Rutland v. Pepper*, 404 F.3d 921, 923 (5th Cir.
 25 2005) ("The FMLA excludes from coverage the personal staff members of
 26 public office holders."). Ms. Chen correctly concedes this point. See

1 *Ramirez v. San Mateo Cnty. Dist. Attorney's Office*, 639 F.2d 509, 513
 2 (9th Cir. 1981) (recognizing deputy prosecutors as the "personal staff"
 3 of the elected prosecuting attorney because they "serve at the pleasure
 4 of their superior, . . . who has plenary power of appointment and
 5 removal"). Thus, Ms. Chen is not eligible for FMLA benefits.

6 Ms. Chen argues that, even though she is ineligible for FMLA
 7 benefits, she is nevertheless entitled to FMLA remedies. This argument
 8 is unpersuasive. Section 2615(a)(1)'s clear language makes it unlawful
 9 for any employer to "interfere with, restrain, or deny the exercise or
 10 the attempt to exercise, any right provided under [the FMLA]." 29 U.S.C.
 11 § 2615(a)(1) (emphasis added). True, Ms. Chen attempted to exercise
 12 rights under the FMLA. But Congress specifically exempted "personal
 13 staff" members from the FMLA; the FMLA does not provide FMLA rights to
 14 those who, like Ms. Chen, serve at the pleasure of their employer. Ms.
 15 Chen has failed to present any authority allowing to exercise a remedy
 16 for a violation of rights that do not exist in the first place. See
 17 *Walker v. Elmore Cnty. Bd. of Educ.*, 379 F.3d 1249, 1253 (11th Cir. 2004)
 18 (holding "that the statute does not protect an attempt to exercise a
 19 right that is not provided by the FMLA"). Thus, Ms. Chen is not entitled
 20 to FMLA protections or remedies. See *Ramirez*, 639 F.2d at 513 (9th Cir.
 21 1981).

22 2. Estoppel

23 Ms. Chen argues that Grant County is estopped from denying her FMLA
 24 coverage. To establish estoppel, a plaintiff must establish the four
 25 traditional elements of equitable estoppel:

26 (1) the party to be estopped knows the facts, (2) he or she
 intends that his or her conduct will be acted on or must so act

1 that the party invoking estoppel has a right to believe it is
2 so intended, (3) the party invoking estoppel must be ignorant
3 of the true facts, and (4) he or she must detrimentally rely
4 on the former's conduct.

5 *United States v. Hemmen*, 51 F.3d 883, 892 (9th Cir. 1995). If a party
6 seeks to estop the government, she must also establish: 1) "the
7 government has engaged in affirmative misconduct going beyond mere
8 negligence" and 2) "the government's act will cause a serious injustice
9 and the imposition of estoppel will not unduly harm the public interest."
10 *Pauly v. U.S. Dep't of Agric.*, 348 F.3d 1143, 1149 (9th Cir. 2003); see
11 also *United States v. Gamboa-Cardenas*, 508 F.3d 491, 502 (9th Cir.
12 2007).⁶ Ms. Chen has failed to make such a showing.

12

13 ⁶ Ms. Chen does not dispute that this heightened standard applies to
14 the County, but argues, without citing authority, that it does not apply
15 to Ms. Hechler in her individual capacity. Ninth Circuit case law leaves
16 unanswered the question of whether or not individual-capacity suits are
17 even allowed under the FMLA in the first place. But even if they are,
18 the heightened equitable estoppel standard applicable to the government
19 should also apply to Ms. Hechler in her individual capacity because Ms.
20 Hechler was acting on Grant County's behalf when she terminated Ms. Chen.
21 See *Lavin v. Marsh*, 644 F.2d 1378, 1383 (9th Cir. 1981) (applying the
22 heightened government estoppel standard despite the fact that the
23 government official was named individually). In the absence of any
24 evidence she was acting outside the scope of her employment, the same
25 heightened standard applies to Ms. Hechler.

1 Viewing the facts in a light most favorable to Ms. Chen, a genuine
 2 issue of material fact exists as to whether Ms. Chen reasonably relied
 3 on Ms. Hechler's statements in deciding to take FMLA leave.

4 [T]he party claiming estoppel must have relied on its
 5 adversary's conduct 'in such a manner as to change his position
 6 for the worse,' and that reliance must have been reasonable in
 7 that the party claiming the estoppel did not know nor should
 it have known that its adversary's conduct was misleading.

8 *Heckler Cnty. Health Servs. of Crawford Cnty., Inc.*, 467 U.S. 51 (1984).
 9 Ms. Chen claims she took time off only because she was assured that she
 10 would be protected under the FMLA. The fact that Ms. Chen obtained a
 11 medical leave (releasing her for one month) and presented it to Grant
 12 County on April 2, 2009, before formally requesting FMLA leave is
 13 immaterial—the evidence shows that she and Ms. Hechler had discussed her
 14 FMLA eligibility before April 2, 2009. And although Ms. Chen's health
 15 care provider certified that Ms. Chen was "presently incapacitated" and
 16 "not able to perform duties from her present employment," (ECF No. 37,
 17 at 119), a genuine issue of material fact exists as to whether Ms. Chen
 18 reasonably relied on Ms. Hechler's affirmation that she was eligible for
 19 FMLA, and changed her position for the worse based on that reliance.

20 Yet, Ms. Chen's FMLA claims fail because she cannot prove that Grant
 21 County or Ms. Hechler engaged in the requisite "affirmative misconduct."
 22 Affirmative misconduct is defined as a "deliberate lie" or "a pattern of
 23 false promises," and requires more than negligence. *Mukherjee v. INS*,
 24 793 F.2d 1006, 1008 (9th Cir. 1986); *United States v. Chug-Shiaing Wang*,
 25 404 F. Supp. 2d 1159, 1163 (N.D. Cal. 2005) ("[G]ross negligence and
 26 incompetence are not sufficient to support a finding of affirmative
 misconduct, which requires that the Government 'either intentionally or

1 recklessly mislead [] the claimant.'"). "Neither the failure to inform
 2 an individual of his or her legal rights nor the negligent provision of
 3 misinformation constitute affirmative misconduct." *Sulit v. Schiltgen*,
 4 213 F.3d 449, 454 (9th Cir. 2000); see also *Socop-Gonzalez v. INS*, 272
 5 F.3d 1176, 1184 (9th Cir. 2001).

6 Ms. Chen was given the opportunity to put forth evidence of Grant
 7 County's affirmative misconduct when the Court continued hearing on the
 8 instant motion. (ECF No. 55.) She failed to do so. The uncontested
 9 evidence shows that Ms. Hechler's representations were nothing more than
 10 mistakes. These do not amount to affirmative misrepresentations. See
 11 *Nagle v. Acton-Boxborough Reg'l Sch. Dist.*, 576 F.3d 1 (1st Cir. 2009);
 12 *Socop-Gonzalez*, 272 F.3d at 843. Ms. Hechler gave Ms. Chen an
 13 informational packet on the FMLA. She consistently advised Ms. Chen that
 14 she was an FMLA-eligible employee, which she believed to be true based
 15 on Grant County's FMLA policy. Ms. Hechler was unaware that deputy
 16 prosecutors were ineligible under the personal staff exemption until
 17 November 1, 2010. And Grant County employees requested, and were
 18 granted, FMLA leave as late as November 2010. Thus, there is no evidence
 19 that Ms. Hechler deliberately or knowingly lied about Ms. Chen's
 20 eligibility for FMLA leave. Grant County's pattern of erroneous
 21 representations to Ms. Chen were consistent with Grant County's FMLA
 22 policy and do not amount to affirmative misrepresentations.

23 Because the evidence shows that Ms. Hechler's representations were
 24 merely mistakes and not affirmative misrepresentations, Defendants are
 25 not equitably estopped from arguing that she is ineligible for FMLA
 26 benefits. Accordingly, Ms. Chen's FMLA claims for retaliation and

1 interference are dismissed because she is a member of the prosecuting
 2 attorney's personal staff and is therefore exempt from FMLA.

3 D. Claims Against Ms. Hechler

4 Defendants ask the Court to dismiss all claims against Ms. Hechler
 5 because she is not an "employer" under either the FMLA or RCW
 6 49.60.040(3) and thus, is not a proper defendant.

7 1. "Employer" under FMLA

8 The FMLA defines "employer" as "any person engaged in commerce or
 9 in any industry or activity affecting commerce who employs 50 or more
 10 employees . . . includ[ing] . . . any person who acts, directly or
 11 indirectly, in the interest of any employer to any of the employees of
 12 such employer . . ." 29 U.S.C. § 2611(4)(A)(i), (ii). Whether an
 13 actor qualifies as an employer under the FLSA and FMLA depends on "the
 14 circumstances of the whole activity." *Gilbreath v. Cutter Biological,*
 15 *Inc.*, 931 F.2d 1320, 1324 (9th Cir. 1991). Factors include the authority
 16 to hire and fire employees, supervision and control of employment
 17 conditions, determination of the rate and method of pay, and maintenance
 18 of employment records. *Bonnette v. Cal. Health & Welfare Agency*, 704
 19 F.2d 1465, 1470 (9th Cir. 1991). "Where an individual exercises 'control'
 20 over the nature and structure of the employment relationship,' or
 21 'economic control' over the relationship, that individual is an employer
 22 within the meaning of the [FLSA], and is subject to liability." *Boucher*
 23 *v. Shaw*, 572 F.3d 1087, 1091 (9th Cir. 2009).

24 The parties agree that Mr. Lee made the decision to lay off Ms.
 25 Chen. And they agree that as Prosecuting Attorney, he has the ability
 26 to make employment decisions regarding deputy prosecutors. See *Osborn*

1 *v. Grant Cnty. By and Through Grant Cnty Com'rs.*, 130 Wn.2d 615, 622
 2 (1996) ("The county officer is the one to appoint a deputy or other
 3 employee, and the officer has the power to revoke each appointment at
 4 pleasure.").

5 Ms. Chen has failed to provide any evidence indicating that Ms.
 6 Hechler played a role in the termination *decision*, even though she
 7 prepared a termination letter, stated her support and sympathy, and
 8 guided Ms. Chen through the FMLA process. She lacks the authority to
 9 hire and fire deputy prosecutors, does not supervise or control their
 10 employment conditions, and does not determine their method and rate of
 11 pay. And in this instance, she did not decide to terminate Ms.
 12 Chen. Ms. Hechler was unaware that Mr. Lee intended to terminate Ms.
 13 Chen: Mr. Lee merely told Ms. Hechler that he was contemplating having
 14 the prosecutors absorb the appellate work. Given these facts, no
 15 reasonable jury could find that Ms. Hechler had the control or authority
 16 to interfere with Mr. Lee's employment decisions; rather, she acted on
 17 Grant County's behalf to carry out Mr. Lee's employment decisions.

18 2. "Employer" under RCW 49.60.040(3)

19 To be liable under RCW 49.60, an individual must have the ability
 20 to influence the plaintiff's employment, supervise or manage her, affect
 21 the terms or conditions of her employment, or act, either directly or
 22 indirectly, in the interest of the employer. RCW 49.60.040(3); *Jenkins*
 23 *v. Palmer*, 116 Wn.2d 671, 674-75 (2003); *Brown v. Scott Paper Worldwide*
 24 *Co.*, 143 Wn.2d 349, 360 (2001). For similar reasons as set forth above,
 25 the Court finds as a matter of law that Ms. Hechler is not an "employer"

1 as defined by RCW 49.60.040(3). Accordingly, these claims are dismissed
2 against Ms. Hechler in her individual capacity.

3 E. Disability Discrimination under RCW 49.60

4 Defendants initially asserted that Ms. Chen's RCW 49.60 claims fail
5 as a matter of law. But after Ms. Chen clarified that she does not
6 assert an accommodation claim but rather alleges that her separation of
7 employment was based upon her having to take medical leave, Defendants
8 recognize that there is a question of fact as to the basis of Ms. Chen's
9 layoff, and therefore withdraw their motion on this claim.

10 F. Wrongful Discharge in Violation of Public Policy

11 Defendants seek summary dismissal of Ms. Chen's wrongful discharge
12 claims, claiming that the FMLA protects the public policy at issue. The
13 parties agree that a public policy discharge claim is only appropriate
14 if Ms. Chen is not afforded other remedies for the same conduct. Because
15 Ms. Chen's first cause of action under the FMLA is dismissed, Defendants'
16 motion for summary judgment as to Plaintiff's claim for wrongful
17 discharge in violation of public policy is denied. That claim shall
18 remain.

19 **II. Defendants' Motion to Continue Trial (ECF No. 64)**

20 Defendants ask the Court to continue the April 25, 2011 trial date
21 and issue a new scheduling order because Defendant Angus Lee and his wife
22 are expecting their third child in April 2011. For the reasons set forth
23 on the record, the Court denies Defendants' motion to continue.

24 But due to the delay caused by the Court's continuing the hearing
25 on Defendants' motion for summary judgment (ECF No. 55), the Scheduling
26 Order shall be amended as follows:

1	Witness & Exhibit Lists	March 4, 2011
2	Objections to Witness & Exhibit Lists	March 11, 2011
3	Exhibits without Objection	April 15, 2011
4	Deposition Designations	March 11, 2011
5	Cross-Designations	March 25, 2011
6	Objection to Deposition Designations	April 1, 2011
7	Motions in Limine	March 11, 2011
8	Pre-Trial Order	March 28, 2011
9	Pre-Trial Conference	April 12, 2011
10	Trial Briefs, Voir Dire, Jury Instructions	April 15, 2011

Accordingly, **IT IS HEREBY ORDERED:**

1. Defendants' Motion for Summary Judgment ([ECF No. 26](#)) **GRANTED**
(First Amendment Retaliation, and FMLA retaliation interference claims;
FMLA and RCW 49.60 disability-discrimination claims against Ms. Hechler)
and DENIED AS MOOT (RCW 49.60 disability-discrimination claims against
Mr. Lee and Grant County; wrongful discharge in violation of public
policy claim) **IN PART**.

2. Defendants' Motion to Continue Trial ([ECF No. 64](#)) is **DENIED**. An
Amended Scheduling Order will follow.

IT IS SO ORDERED. The District Court Executive is directed to enter
this Order and provide copies to counsel.

DATED this 3rd day of March 2011.

s/Edward F. Shea
EDWARD F. SHEA
United States District Judge

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